95-1403

Supreme Court, U.S.
FILED
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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1995

MARK STRUCK,
Petitioner

v.

KENNEBEC COUNTY, MAINE;
FRANK HACKETT in his official
capacity as Sheriff of Kennebec
County, Maine, and individually;
CHARLES DOW, SR., GEORGE JABAR, II,
and WESLEY G. KIELTYKA, in their
official capacities as County
Commissioners of Kennebec County, Maine,
Respondents

**ON PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE**

PETITION FOR WRIT OF CERTIORARI

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54 pp

1. Does Mark Struck, the Petitioner, have a clearly established, constitutionally protected right to intimate association with Jean Lettre, a woman he lived with, which precluded the Kennebec County Sheriff's Office from terminating him based on that association?

2. Was the Petitioner, Mark Struck's, right of association irrationally and arbitrarily infringed upon when the Sheriff fired Mr. Struck based upon his relationship with his live-in companion, Jean Lettre, who at the time was alleged to have embezzled funds from the Sheriff's Office?

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Mark Struck prays that a Writ of Certiorari be granted to review the judgment of the Maine Supreme Judicial Court entered in Struck v. Kennebec County, et al. on November 27, 1995.

OPINIONS BELOW

The Order of the Kennebec County Superior Court in Mark Struck v. Kennebec County, et al., on the Defendants' motion for summary judgment was delivered on July 7, 1994 and is reproduced in Appendix A of this petition. The Opinion of the Maine Supreme Judicial Court is reported at 668 A.2d 411 (Me. 1995) and is reproduced in Appendix B of this petition.

JURISDICTION

The judgment of the Maine Supreme Judicial Court in Mark Struck v. Kennebec County, et al., was entered on November 27, 1995 and the Court's mandate issued the same day. The Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,
Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Mark Struck, the Petitioner, began work as a corrections officer for the Kennebec County Jail on May 15, 1989. During this probationary period, Mr. Struck was evaluated in writing by his immediate supervisors at least twice. Mr. Struck was hired as a permanent, non-union corrections officer at the end of his probationary period.

While a corrections officer, Mr. Struck began dating Kennebec County Sheriff Hackett's personal secretary, Jean Lettre, and then moved to her residence. Mark Struck lived with Jean Lettre for eight months. The couple shared finances for which Jean Lettre was responsible. They also shared intimate sexual relations. The nature and extent of this relationship was well known to Sheriff Hackett.

In early spring of 1991, while still working as a permanent, non-union corrections officer, Mr. Struck applied for a position as a patrol officer. Mr. Struck was officially transferred to his new position on March 8, 1991.

On May 24, 1991, Mr. Struck responded to an accident. It was later suggested that Mr. Struck used unnecessary speed in responding. As a result, Mr. Struck received a two-day suspension the following week. He was

informed that no further disciplinary action would be taken. Deputy Sheriff Mark Brown was suspended for four days stemming from a similar high-speed response to the same accident.

On June 24, 1991, Sheriff Hackett discovered that his personal secretary, Jean Lettre, had embezzled several thousand dollars from the department, through her access to seized evidence and other department funds.

On hearing of Ms. Lettre's embezzlement, Mr. Struck immediately moved out of the home they shared together and returned to his parents' home. Mr. Struck was never charged with any connection to Ms. Lettre's criminal activity.

The Sheriff and his Chief Deputy advised Mark Struck that they knew he had nothing to do with the embezzlement. They also initiated an investigation which subsequently revealed Ms. Lettre was using a separate checking account, different from the joint account she shared with Mark Struck, to deposit the embezzled funds.

Nevertheless, on June 26, 1991, Sheriff Hackett summoned Mr. Struck to his office and handed him a termination letter. Sheriff Hackett based his decision to fire Mark Struck, at least partly, upon Mr. Struck's relationship with Jean Lettre. Sheriff Hackett also

gave Mr. Struck the option of submitting a resignation letter instead of being fired. On June 28, 1991, Mr. Struck submitted his resignation letter to Sheriff Hackett.

The federal question of right of intimate association was first raised in Count I of the complaint under §1983.

The first amendment argument was subsequently raised at the summary judgment stage of the trial proceedings. Specifically, it was argued in the Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment submitted to the Superior Court of Kennebec County on May 9, 1994. The memorandum argued that Mark Struck's first amendment constitutional right of intimate association was violated by the Defendants and that, therefore, summary judgment should not be granted.

The Superior Court of Kennebec County determined, in a decision rendered on July 7, 1994, and reproduced in Appendix A, that summary judgment on Count I should be denied with respect to defendant Hackett.

The Court stated that factual issues remained as to "whether the Sheriff used the Plaintiff's relationship in violation of the Plaintiff's constitutional rights as a reason for his discharge." (App. @ 29).

The federal question of right of intimate association was subsequently raised before the Maine Supreme Judicial Court, Law Docket No. KEN-94-667 in written and oral arguments on September 20, 1995. The Defendants took an interlocutory appeal from a partial denial of their motions for summary judgment entered in the Superior Court. Mark Struck, the Plaintiff, cross-appealed from the entry of a partial summary judgment in favor of the Defendants. In oral arguments, the Plaintiff argued that Mr. Struck's relationship with Jean Lettre was protected under the First Amendment and could not be used as the basis of job termination. The Court determined, in a decision rendered November 27, 1995, and reproduced in Appendix B, that the right of intimate association for non-married couples is not clearly established. (See Appendix B).

I. REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

A. Mark Struck's Relationship with Jean Lettre was a Clearly Established Intimate Association Right and, Therefore, Should be Constitutionally Protected

On November 27, 1995, the Maine Supreme Judicial Court held in Struck v. Kennebec County, et al., Law Docket No. KEN-94-667, that the right of intimate association does not extend beyond marriage and, therefore, is not clearly established. That decision is in direct conflict with this Court's mandates and the federal courts of appeals' decisions regarding First Amendment intimate association rights.

The constitutional foundation of intimate associational rights was described in Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244 (1984):

> "Our decisions have referred to constitutionally protected 'freedom of association' in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is

> central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty."
> 104 S. Ct. 3244, 3249 (1984)

Justice Brennan then explained that the right of intimate association does not stop at family relationships.

> "(W)e have not held that constitutional protection is restricted to relationships among family members. We have emphasized that the First Amendment protects those relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."
> Board of Directors of Rotary International v. Rotary Club of Duarte et al., 481 U.S. 537, 545 (1986) quoting Roberts v. United States Jaycees, supra, 468 U.S. 609 at 619-620.

In stark contrast to that holding, the Maine Supreme Judicial Court wrote in Struck:

> "Although Roberts may leave open the possibility that relationships short of marriage, such as engagements, will be constitutionally protected 'intimate associations,' the case law is far from certain on that issue." P.12 of Maine Supreme Judicial Court Decision No. 7462.

We disagree.

This Court has established the guidelines to determine whether a relationship constitutes an intimate association:

> "Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. Roberts v. United States Jaycees, supra, 468 U.S. 609 at 620 citing Runyon v. McCrary, 427 U.S. 160, 187-189 (1976) (Powell, Jr., concurring) And "(i)n determining whether a

> particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." Board of Directors of Rotary International, et al. v. Rotary Club of Duarte, et al., 481 U.S. 537 at 546 citing Roberts v. United States Jaycees, 468 U.S. 609 at 620.

The State Law Court's decision is entirely devoid of the "careful assessment" required by Roberts. The state decision makes no attempt to locate Mark Struck's relationship with Jean Lettre on the spectrum of most intimate to most attenuated of personal relationships. Instead, it rides rough shod over the First Amendment and the analysis required by Roberts.

In reaching its conclusion, the State Law Court cited a number of cases which it believed supported its proposition that relationships outside of marriage are not clearly protected under the Constitution. The State Law Court cited Swank v Smart, 989 F.2d 1247, 1251-52 (7th Cir. 1990) (no right of intimate association implicated when police officer gave half-hour ride on motorcycle to young woman of casual acquaintance); City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989)

(attendance at dance hall with other teenagers does not satisfy requirements); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 237 (1990) (relationship of ten hours carried out in a motel room not type of intimate association protected by the First Amendment). However, the Maine Law Court skips a crucial step in its reliance upon these decisions for the broad based proposition that there are no clearly established intimate associational rights outside of marriage. The relationships in each of those cases were not given constitutional protection under the right of intimate association because they failed to meet one or more criteria laid out in Roberts. They failed to meet the requisite size, purpose, selectivity, and/or exclusivity guidelines.

It is because of that misplaced reliance on the form rather than the substance of the relationship that the Petitioner requests review.

The Maine Law Court's reasoning was rejected by the U.S. Supreme Court in Moore v. City of East Cleveland 431 U.S. 494 (1976). In that case, the Court rejected the notion that grandmothers and their grandsons did not have any constitutional right to live together as a family because the Court, in its previous decisions, had not expressly given "grandmothers any fundamental right with respect to grandsons." Moore v. City of East Cleveland, 431 U.S. 494, 500 quoting Brief for Appellee 18.

Justice Powell, writing for the majority, explained: "To be sure, these cases (Meyer and Pierce) did not expressly consider the family relationship presented here...But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." Moore, 431 U.S. 494, 500-501.

In order for a right to be clearly established, "...we need not find a ruling that considered the precise situation at hand. It is enough, rather, that there existed case law sufficient to clearly establish that, if a court were presented with such a situation, the court would find that plaintiffs' rights were violated." Hall v. Ochs, 817 F.2d 920, 925 (1st Cir. 1987).

The Maine Supreme Judicial Court has, in effect, closed its eyes and refused to apply the force and rationale of Roberts, supra, and Board of Directors of Rotary International, et al., supra, to this case. The fact that Mark Struck was not married to his live-in girlfriend does not mean that his constitutionally protected right of intimate association was not clearly established.

> "The logic of the freedom of intimate association - that

> is, the implications of the values that are the substantive components of this associational freedom -cannot be contained at the status boundaries of formal marriage or legitimacy of parentage." Karst, The Freedom of Intimate Association, 89 Yale Law Journal 624, 652 (1980).

Perhaps the function of the right of intimate association in the United States today can best be explained by Justice Harlan and his discussion of the Due Process Clause:

> "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this

> country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing." Moore v. City of East Cleveland, supra, at 501 quoting Poe v. Ullman, 367 U.S. 497 (1961).

It has been said that love is a necessary condition of life. And traditionally, as a symbol of love, couples have married and this Court has supplied marriage constitutional protection. Yet, in ever-increasing numbers, couples are choosing to break tradition and to live together as a substitute for or as a prelude to marriage.

Between 1970 and 1994, the number of unmarried couples (two unrelated adults of the opposite sex sharing the same household) in the United States has increased more than seven fold from 523,000 to greater than 3,600,000. U.S. Bureau of the Census, Statistical Abstract of the United States: 1995 (115th edition.) Washington, DC, 1995.

Given these numbers, the Court needs to specifically address the contention raised by the Maine Supreme Judicial Court. Is the right of intimate association limited to married couples? Constitutional authority and case precedent clearly establish that intimate associational rights are not

bounded by the existence of a wedding band.

Simply because love and intimacy have found a different form of expression does not mean that they should be any less constitutionally protected. The intimacy found in committed and mature relationships is an essential aspect of personal liberty that must be protected from unnecessary government interference. And the Court in Roberts, through a "rational process", protected this personal liberty by not limiting the right of intimate association to married couples and families.

The strength of Roberts is that it does not try to establish a bright line distinction between those relationships which are protected as intimate association and those which are not. Roberts, itself, talks about analysis along a spectrum. Certainly there are cases where a relationship is not significantly intimate enough to warrant constitutional protection. The marriage engagement in Cameron v. Seitz, 38 F. 3d 264 (6th Cir. 1994) is an example of a relationship that was not sufficiently intimate to warrant constitutional protection.

An engagement certainly fulfills some of the criteria described in Roberts. Presumably, the size of an engagement relationship is small with only two participants. Also, people are usually quite selective before entering

into an engagement. One cannot be engaged to multiple people at the same time and there is an obvious limit to the number of engagements one person can have in a lifetime. But the engagement relationship, alone, falls short of a clearly established, constitutionally protected intimate association right by failing to meet two important criteria: purpose and exclusivity.

The purpose of an engagement is to announce, usually publicly, a semi-formal commitment of two people to agree to spend their lives together. An executory contract if you will. But it is not the agreement, itself. Engagement, alone, does not entail the sharing of lives. Couples who live together (almost always) and married couples (usually) share finances, food, living arrangements, sexual relations and the like. There is no such purpose and exclusivity inherent in an engagement relationship alone. It may well be there. However, the single fact of an engagement agreement does not, in and of itself, create an intimate association. Engagement describes a plan for a relationship that <u>will</u> be constitutionally protected while live-in couples and married couple <u>exist</u> in that constitutionally protected relationship.

Similarly, dating is another example of a type of relationship that may or may not be sufficiently intimate to reach the safe harbor of constitu-

tionally protected associational rights.[1] There is a significant difference of opinion between the 11th (See Hatcher, ibid and Wilson, ibid) and the 7th Circuits (Swank, supra,) as to whether dating is protected under the First Amendment. Given that difference of opinion amongst the Circuits, there is a need for this Court to reaffirm that it is the substance of the relationship which determines the level of intimacy rather than the form of the relationship.

For instance, dating would generally appear to fulfill even fewer of the criteria described in Roberts than an engagement. A dating relationship is usually small in size but the purpose of a date may be as insignificant as the sharing of a cup of coffee or going for a ride on a motorcycle. Further, people are often neither selective nor exclusive in their dating

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[1] Interestingly, the 11th Circuit has found "dating" to reach the level of intimacy required for constitutional protection. See Hatcher v. Board of Education and Orphanage, 809 F.2d 1546, 1558 (11th Cir.1987) ("[E]ven a public employee's association choices as to whom to date enjoy constitutional protection"); Wilson v. Taylor, 733 F.2d 1539, 1544 (11th Cir. 1984) ("We conclude that dating is a type of association which must be protected by the first amendment's freedom of association").

relationships. People frequently date numerous people at the same time and a dating relationship often has no critical aspect from which others even could be excluded. There is no commitment inherent in a dating relationship to the sharing of the participants' lives. And the possibility of a casual dating relationship developing into a constitutionally protected intimate association is significantly more attenuated than an engagement relationship.

There is no such difficulty in this case. Whether the relationship Mark Struck had with Jean Lettre is defined by the intimate association parameters laid out in Roberts or by the definition supplied by Kenneth Karst:

> "By 'intimate association' I mean a close and familiar personal relationship that is in some significant way comparable to a marriage or family relationship." Karst, supra, at 629.

There is no question that Mark Struck enjoyed a constitutionally protected intimate association with Jean Lettre.

Mark Struck lived with Ms. Lettre for the eight months prior to her confession of embezzling funds from the police department. Their relationship was romantic and they had dated prior to their live-in situation. They ate

together, slept together, and experienced life together. During this time, Mark Struck handed all finances over to Jean Lettre. They set up joint checking accounts, joint credit cards, and shared all expenses. Miss Lettre handled all the finances in the relationship from paying the bills to depositing Mr. Struck's paycheck in their account.

This relationship obviously meets Mr. Karst's definition of "...a close and familiar personal relationship that is in some significant way comparable to a marriage..." Karst, supra. The relationship also easily meets the criteria described in Roberts. The relationship is certainly small in size consisting of only two people. The purpose of the relationship, from the facts presented, obviously involved a commitment by Mark Struck and Jean Lettre to the sharing of their lives. The work and energy required to maintain serious relationships automatically requires that the participants be selective. And, finally, other people were necessarily excluded from the relationship in its critical aspects whether they be social or sexual.

In granting this petition, the Court can reaffirm the substantive process required by the Constitution in assessing intimate associational rights. By doing so, it clarifies for all courts that there is no magic form to intimate associations. A court cannot simply say dating or engagement is protected or not

because of what is implied in those relationships. A court must assess the substance of the relationship in light of the Roberts four-part test.

B. Mark Struck's Liberty Interest Found in the Freedom of Association was Irrationally and Arbitrarily Infringed Upon by the Actions of the Kennebec County Sheriff's Department

The infringement upon Mark Struck's associational rights is more egregious when viewed in light of the due process requirements of the Constitution. Justice Harlan argued in Poe v. Ullman, supra, as cited by Justice Powell in Moore v. City of East Cleveland, supra, about the need for the Constitution to grow with the changing mores and traditions in society. In that same discussion, Justice Harlan emphasized that due process requires a process free from arbitrary and irrational decision-making. The language used by Justice Harlan in Poe and cited by Justice Powell in Moore, is a stirring testament to the beliefs which make the United States the most successful democracy on the face of the earth. Justice Harlan says:

> "If the supplying of content to this Constitutional concept [Due Process] has of necessity been a rational process, it certainly has not been one where judges have felt free to

> roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke." Moore citing Poe, 431 U.S. 494 at 501 (1976).

The traditions from which this country developed are ones of informed and rational decision-making and a history of accountability for one's actions. The tradition from which we broke are those which centralized power in the hands of a single autocrat. At heart, this case contains the same seeds that this country rejected 220 years ago. This is a case where a single man, the Sheriff of Kennebec County, made a decision dramatically affecting Mark Struck's life on a whim. The Sheriff admits that he fired Mark Struck from his position as a patrol deputy, at least in part, because of Mark's relationship with Jean Lettre, a woman who embezzled funds from the Sheriff's Office. There is no evidence which remotely might suggest that Mr. Struck ever assisted in the embezzlement. In fact, the Sheriff's investigation revealed that Ms. Lettre had set up a separate account into which she funneled the embezzled funds. The Sheriff and his Chief Deputy both assured Mark Struck that they knew he "had nothing to do with it [the embezzlement]."

Nonetheless, Mr. Struck was terminated. He was terminated based on an irrational decision made by the Sheriff. He was terminated solely because of his association with another human being.

The Defendants would have the Court believe that if there is no right of intimate association, there is no remedy for Mr. Struck. Essentially, they argue the Sheriff is free to do as he pleases if there is no intimate relationship between Mr. Struck and Ms. Lettre. However, judicial scrutiny does not simply disappear for relationships that are not deemed intimate.

The Constitution also protects "harmless liberties" discussed in Ellwest Stereo Theaters, Inc. v. Wenner 681 F. 2d 1243, 1247 (9th Circuit 1982).

> "A law that enjoined silence on all persons not participating in the marketplace of ides,...a law that forbade dating...all of these hypothetical laws would infringe liberty. If arbitrary, they would be deemed to violate 'substantive due process,' the term for the protection that the due process clause has been held to extend to substantive rights not listed in the Bill of Rights." Swank v. Smart, 898 F. 2d 1247, 1251 (7th Cir. 1990).

Whether Mark Struck's associational rights are placed under the First Amendment or the Fourteenth Amendment[2], they cannot be infringed upon arbitrarily or irrationally.

The decision to effectively terminate Mark Struck infringed upon his liberty interest in the right to freedom of association both arbitrarily and irrationally. If the decision to terminate Mark Struck was put into regulation form, it would read as follows:

> "If an officer maintains a romantic relationship with anyone who has or may commit a crime in the future, regardless of whether the officer participates in this crime, he/she will be forced to resign."

In other words, date no one unless you are willing to take your chances.

The beliefs upon which the Constitution is predicated absolutely reject the notion of guilt by association.

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[2] It is unclear whether associational rights are to be found in the Fourteenth Amendment, the First Amendment or both. For a brief discussion, see the concurring opinion of Justice Stevens in City of Dallas et al. v. Stanglin, 490 U.S. 19, 28 (1989).

> "Both (the Fifth Circuit Court of Appeals) and the Supreme Court have recognized that under our system of justice punishment must be predicated upon personal guilt." Sawyer v. Sandstrom, 615 F. 2d 311, 316 (1980); see also Healy v James, 92 S.Ct. 2338 (1972).

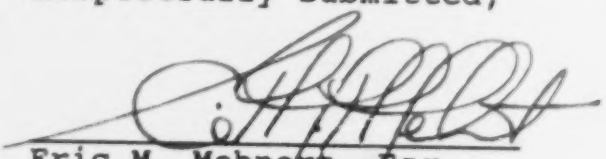
Mark Struck was not personally guilty for the acts of Jean Lettre. And, more importantly, did not even wish to be associated with a criminal. Mr. Struck broke off his relationship with Jean Lettre after he heard of her confession of embezzlement. Mark Struck's liberty to date and live with whom he pleased was arbitrarily and irrationally infringed upon by the actions of the Kennebec County Sheriff's Department.

CONCLUSION

For the reasons set forth in this Petition, a Writ of Certiorari should issue to review the judgment and opinion of the Maine Supreme Judicial Court.

Dated: February 23, 1996

Respectfully submitted,



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APPENDIX A

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-91-535

MARK STRUCK)
)
v.) ORDER
)
KENNEBEC COUNTY,)
et al.,)

This matter is before the court for a decision on defendant's motion for summary judgment. In arriving at its decision in this matter, the court has considered the excellent briefs filed by the parties as well-reasoned oral argument presented by counsel.

With regard to Count I, which are the 42 U.S.C. § 1983 claims, the court finds that the County and Commissioners can not be held liable under section 1983 under the theory of respondeat superior. City of Canton v. Harris, 489 U.S. 378, 385 (1989). Further, the plaintiff has not presented any evidence that the Commissioners' alleged failure to review the Sheriff's discharged decisions is sufficiently wide-spread so as to reflect a policy. Nor has the plaintiff shown that any such policy or custom of the County or the Commissioners was causally linked to the

alleged violation of the plaintiff's First Amendment rights. Mornell v. New York City Dep't. of Social Services, 436 U.S. 658, 690 (1978); San Diego v. Fenton, 891 F.2d 373, 381 (1st Cir. 1989). Therefore, defendants Kennebec County and the Kennebec County Commissioners are entitled to judgment on Count I and the court grants judgment in their favor.

With respect to defendant Hackett, however, factual issues remain. For example, the trier of fact must determine if it was objectively reasonable for the plaintiff to believe that he had a property interest in continued employment and whether the Sheriff used the plaintiff's relationship in violation of the plaintiff's constitutional rights as a reason for his discharge. With regard to Sheriff Hackett, therefore, the motion for summary judgment on Count I is denied.

With regard to Count II, the State's civil rights claim, it is the defendants' contention that the plaintiff has failed to state a claim for relief under the Maine Civil Rights Act, 5 M.R.S.A. § 4682. That provision states in pertinent part:

> Whenever any person ... intentionally interferes by physical force or violence, or the treat of physical force or violence, or attempts to intentionally interfere by physical force or violence, or

> the threat of physical force or violence, with the exercise or enjoyment of any other person's rights ... the person whose exercise or enjoyment of rights has been interfered with or attempted to be interfered with may institute and prosecute ...

Therefore, under the terms of the statute set out above, the plaintiff must show physical force or violence, or a threat of the use of physical force or violence, used in interfering with a person's enjoyment of rights. Based upon a review of the pleadings in this matter, it is clear that the plaintiff has not alleged any acts, attempts, or threats, or physical force or violence which deprived him of any civil right. Accordingly, defendants are entitled to judgment as a matter of law on that portion of plaintiff's complaint which alleges violation of plaintiff's state civil rights.

With regard to Counts III through VII, which are claims based on state law, the court finds that there are issues of fact that are in dispute which affect the claims of immunity. Particularly, the trier of fact will have to determine if the Sheriff performed any intentional acts in bad faith. These matters can only be resolved by a trier of fact and, therefore, defendants' motion for summary judgment with regard to Counts III through VII is denied.

With regard to plaintiff's claim for punitive damages, the County may not be held liable. City of Newport v. Facts Concerts, Inc., 435 U.S. 247, 267 (1981). In addition, the Commissioners had no personal involvement in the discharge of the plaintiff. Their actions were not directed at him. Therefore, the Commissioners can not be held liable for punitive damages since there is no showing that their conduct was "motivated by evil motive or intent" or "involved reckless or callous indifference to federally-protected rights of others." Smith v. Wade, 461 U.S. 30, 56 (1983). However, with regard to the actions of defendant Sheriff Hackett, the court concludes that there still do remain genuine issues of material fact with respect to his motives and intent. Therefore, summary judgment for Sheriff Hackett on the punitive damage issue would not be appropriate.

For the reasons set forth above, the entry will be:

Defendant Kennebec County and Kennebec County Commissioners' motion for summary judgment as to Count I GRANTED.

Defendant Hackett's motion for summary judgment on Count I DENIED.

Defendants Kennebec County, Kennebec County Commissioners, and Sheriff Hackett's motion for summary judgment as to Counts III through VII GRANTED. Judgment for defendants.

Defendants Kennebec County, Kennebec County Commissioners, and Sheriff Hackett's motion for summary judgment with regard to Count II GRANTED. Count II DISMISSED for failure to state a claim.

Defendants Kennebec County and Kennebec County Commissioners' motion for summary judgment on the issue of punitive damages GRANTED. Judgment for those defendants on that issue.

Defendant Hackett's motion for summary judgment on the issue of punitive damages DENIED.

Dated: July 7, 1994 "s/BruceChandler"
Justice,
Superior Court

APPENDIX B

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 7462
Law Docket No. KEN-94-667

MARK STRUCK

v.

FRANK HACKETT, et al.

Argued September 20, 1995
Decided November 27, 1995

Before, WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, RUDMAN, DANA and LIPEZ, JJ.

CLIFFORD, J.

The defendants, Kennebec County Sheriff Frank Hackett, the County, and the County Commissioners,[1] appeal from

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[1]The County Commissioners named are: Charles Dow, Sr., George Jabar, II, and Wesley G. Kieltyka. Struck's complaint avers six separate counts against Hackett and against "Kennebec County;" it would appear that Struck's use of the term encompasses both Kennebec County and the Kennebec County

a partial denial of their motions for a summary judgment entered in the Superior Court (Kennebec County, Chandler, J.). Mark Struck cross-appeals from the entry of a partial summary judgment in favor of the defendants. This suit centers on Struck's claim that his termination from his position as a patrol deputy with the Sheriff's Department was wrongful and in violation of his constitutional, statutory, and contractual rights. Because Struck failed to present evidence to support a recovery against any defendant under federal or state law, we vacate the judgment in part and remand for entry of a judgment for the defendants.

The Kennebec County Jail is part of the corrections division of the Sheriff's Department. The other division of the Sheriff's Department is the law enforcement division. The Sheriff maintains operational control over both the corrections and the law enforcement divisions. Although both departments are managed by the Sheriff, the budgets for each department are completely separate. In addition, positions in the two departments are quite distinct; differences in educational and training requirements, uniforms, use of county vehicles, authority to make arrests, and authority to carry a firearm, set patrol officers apart from corrections officers.

Commissioners.

The Sheriff submits department budget proposals to the County Commissioners. In addition, the Sheriff is required by statute to receive prior approval from the County Commissioners when hiring or terminating a full-time employee.[2]

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[2]30-A M.R.S.A. §501 (1994) provides in pertinent part:

> **1. Employment.** All county officers or department heads shall submit to the county commissioners or the County Personnel Board, if one has been established under article 2, the name of any person the county officer or department head proposes to employ or the names of more than one person from which the county commissioners or personnel board are to select a person for employment. The county commissioners or the County Personnel Board may approve the employment of the person or select a person for employment. If approval is withheld or a selection is not made, the county commissioners or the County Personnel Board, within 14 days after the name or names have been submitted, shall notify the county officer or department head of the reasons for their disapproval or failure to make a selection.
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> ....
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> **3. Dismissal, suspension, discipline.** A county officer or

department head may dismiss, suspend or otherwise discipline a department employee only for cause, except as provided in paragraph A. Cause for dismissal, suspension or disciplinary action must be a just, reasonable, appropriate and substantial reason for the action taken that relates to or affects the ability, performance of duties, authority or actions of the employee or the public's rights or interests.

A. An employee may be dismissed by a county officer or department head only for cause and only with the prior approval of the county commissioners or personnel board, except that county employees may be laid off or dismissed, with the approval of the county commissioners or personnel board, to meet the requirements of budget reduction or governmental reorganization.

B. In every case of suspension or disciplinary action other than dismissal, at the employee's request, the county commissioners or personnel board shall investigate the circumstances and fairness of the action and, if they find the charges unwarranted, shall order the employee's reinstatement to the employee's former position with no loss of pay, rights or benefits resulting from the suspension or disciplinary action.

Struck began work as a corrections officer for the Kennebec County Jail on May 15, 1989. He attended the two-week basic corrections course at the Criminal Justice Academy, and then served a six-month probationary employment period as a corrections officer. During this probationary period, Struck was evaluated in writing by his immediate supervisors at least twice. Struck was hired as a permanent, non-union Corrections officer at the end of his probationary period. During his time as a Corrections officer, Struck began dating Hackett's personal secretary, Jean Lettre, and then moved to her residence.

In the early spring of 1991, while still working as a permanent, non-union corrections officer, Struck applied for a position as a patrol officer. Struck was officially placed in his new position on March 8, 1991. Struck was to undergo an additional probationary period in this new position until August or September of 1991. During this probationary period, Struck was never officially evaluated, either in writing or orally. When he inquired of his immediate supervisors, Struck alleges they told him not to worry about evaluations because he had already passed the probation and was guaranteed a permanent position.

On June 24, 1991, Hackett discovered that his personal secretary, Jean Lettre, had embezzled several thousand dollars from the department,

through her access to seized evidence and other department funds.[3] On hearing of Lettre's embezzlement, Struck immediately moved out of the home they shared together and returned to his parents' home. Struck was never charged with any connection to Lettre's criminal activity.

On June 26, 1991, Hackett summoned Struck to his office and handed him a termination letter. Hackett also gave Struck the option of submitting a resignation letter instead of being fired. At no time did Hackett seek or obtain the approval of the County Commissioners to terminate Struck. On June 28, 1991, Struck submitted his resignation letter to Hackett.

Count I of Struck's complaint alleges that the defendants violated 42 U.S.C.A. §1983 (1994),[4] by depriving

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[3]Lettre pleaded guilty to two Class B thefts for the embezzlement.

[4]42 U.S.C.A. §1983 (1994) provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction hereof to the deprivation of any rights, privileges, or immunities secured by the

Struck of a property right (continued employment) without due process of law, and by depriving him of his Fourth Amendment right to be free from unreasonable intrusion into his privacy in his personal relationships; Count II alleges that the defendants violated the Maine Civil Rights Act, 5 M.R.S.A. §§4681 - 4686 (Supp. 1994); Count III alleges a breach of contract; Count IV alleges a breach of the implied covenant of good faith and fair dealing; Count V alleges a breach of an implied contract; Count VI alleges a breach under a detrimental reliance/promissory estoppel theory. Struck requests compensatory and expectancy damages (including reinstatement and back pay) on all counts; punitive damages are sought on Counts I and II (the civil rights claims).

Pursuant to M.R. Civ. P. 56(c), a partial summary judgment was granted in favor of the County and the Commissioners on Count I, the section 1983 claim, on the basis that Struck had submitted no evidence establishing the involvement of the Commissioners in his termination and no evidence of a pervasive policy of non-reviewal of the Sheriff's termination decisions. A summary judgment was entered in favor of all defendants on Count II, the Maine

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Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other p r o p e r proceeding for redress.

Civil Rights Act.[5]

The court denied the defendants' motions for a summary judgment on Count I as to Hackett, and on Counts III through VI[6] as to all defendants. The court granted a summary judgment for the County and the Commissioners on Struck's claims for punitive damages.[7] The defendants appealed those portions of the order denying summary judgments and, following the entry of a final judgment pursuant to M.R. Civ. P. 54(b), Struck cross-appealed.

Ordinarily, an order denying a motion for summary judgment would not be immediately appealable because it is not a final judgment. An exception to the final judgment rule is applicable here, however, because of the assertion by the defendants of qualified immunity or discretionary function immunity. See Creamer v. Sceviour, 652 A.2d 110, 112 n.4 (Me. 1995) (citing Ryan v. City of Augusta, 622 A.2d 74, 75 (Me. 1993)).

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[5]Struck does not challenge the entry of summary judgment on the state civil rights claim.

[6]The order actually refers to Counts III through VII, however, there was no Count VII.

[7]Struck does not challenge the entry of a summary judgment on the claim for punitive damages against the County or the Commissioners.

On appeal, "[w]e review the trial court's decision [on a motion for summary judgment] for errors of law, viewing the evidence in the light most favorable to the party against whom the judgment was entered, and will affirm a summary judgment 'when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.'" Creamer, 652 A.2d at 113 (citing Finnemore v. Bangor Hydro-Elec. Co., 645 A.2d 15, 16 (Me. 1994).

I.

Defendants contend that Hackett is immune from suit under 42 U.S.C.A. §1983 because of "qualified immunity." Whether a defendant is immune from suit is a question of law. Polley v. Atwell, 581 A.2d 410, 412 (Me. 1990). "Under the qualified immunity doctrine, government officials performing discretionary functions are immune from suit in actions brought pursuant to §1983 'insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known.'" Ryan, 622 A.2d at 75-76 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

> The application of the qualified immunity doctrine turns on the "objective legal reasonableness of the official's action viewed in light of the 'clearly established'" legal rules at

> the time the action was taken. In order to determine that a right is clearly established "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." It is not necessary, however, for the action in question to have been previously held to be unlawful.

Ryan, 622 A.2d at 76 (quoting Anderson v. Creighton, 483 U.S. 635, 639, 640 (1987)). Therefore, under the section 1983 claim, Struck must establish that (1) he possessed a particular statutory or constitutional right, (2) Hackett violated that right, (3) the right was clearly established at the time, and (4) a reasonable official would have known that his actions violated that clearly established right.

Struck argues that he was deprived of a clearly established right to due process when he was deprived of a property right (employment) without a hearing. "[D]ue process requires some kind of a hearing before a government deprives a person of property." Ryan, 622 A.2d at 77 (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985)). The facts are sufficient to support a claim that Struck was terminated without a hearing, but Struck must establish that he had a property right in his employment.

A.

A statutory right to termination only for just cause creates a constitutionally protected property right. Hammond v. Temporary Compensation Review Bd., 473 A.2d 1267, 1272 (Me. 1984). Struck argues that he was protected from termination except for just cause by virtue of the statutory scheme that guides the operation of the Kennebec County Sheriff's Department. He contends that 30-A M.R.S.A. §381 (Pamph. 1994),[8] which

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[8]30-A M.R.S.A. §381 (Pamph. 1994) provides in pertinent part:

The sheriff may appoint, subject to the requirements of section 501, full-time or part-time deputies, whose special duties are to enforce the criminal laws in the county.

1. Qualifications for appointment. To be eligible for appointment, a deputy must have:

A. Actual experience in law enforcement duties;

B. Training in criminal justice or law enforcement from an accredited college or university or from the Maine Criminal Justice Academy.

C. Knowledge of the duties, activities and responsibilities

specifically deals with probationary deputies, incorporates into it all the protection of section 501(3), and that although the Sheriff could have chosen not to reappoint Struck at the end of the 6-month probationary period for any reason or no reason, he could not terminate him prior to that time except for just cause. We disagree.

Not all of the protections of

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of a deputy gained from other experience or training.

2. Training at the Maine Criminal Justice Academy required. Appointed deputies are subject to the training requirements of Title 25, sections 2804-B to 2804-F.

3. Tenure of office. Deputies shall be originally appointed for a probationary period of not more than 6 months and thereafter may be appointed or reappointed for a term of 3 years.

A. The failure of a sheriff to reappoint a deputy, except for appointment at the end of the probationary period, is subject to the procedures and standards for dismissal of an applicable collective bargaining agreement.

4. Sheriff to furnish names. From time to time, each sheriff shall furnish to the county commissioners of that county the names of the deputies appointed...

section 501 are incorporated into section 381. The procedures of section 501 are contained in section 381 only with respect to appointments, not terminations, of deputies. Within section 381 there is a distinction between probationary deputies and permanent deputies, and the authority of the Sheriff to terminate probationary employees is not limited. The language in section 381 regarding the probationary period limits the length of that period to not more than six months; it does not guarantee that the probationary employment will be six months.

An interpretation of section 501 to restrict the power of the Sheriff to terminate probationary employees would render the term "probationary" meaningless, and it is well established that "[n]othing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible." Labbe v. Nissen Corp., 404 A.2d 564, 567 (Me. 1979). Struck did not have a property right in his probationary position by virtue of any statutory scheme.

B.

Struck argues in the alternative that he had a property right in a permanent position as a patrol deputy by virtue of the conduct and practices of his employer. He alleges that he was assured by his immediate supervisors that he had earned a permanent position

following probation, and that Hackett's failure to demand evaluations from Struck's supervisors constitutes ratification of their alleged statements. Struck contends that the organizational structure of the two departments is such that his new position was merely a 'transfer,' and that he was never in a second probationary period. Finally, Struck argues that the Department's practice of treating union and non-union employees similarly, and of terminating probationary employees only for just cause, created a reasonable expectation of continued employment.

Assuming all of Struck's allegations are true, as we must, see Estate of Althenn v. Althenn, 609 A.2d 711, 714 (Me. 1992), they nevertheless fail as a matter of law to establish a reasonable expectation of continued employment. Although it is true that such expectations, and with them a protected property interest, can be created by virtue of unwritten or implicit understandings regarding employment terms, see Perry v. Sindermann, 408 U.S. 593, 601 (1972) (the absence of a formal contract does not bar a professor from arguing he had tenure by mutual understanding), the circumstances in this case preclude such an expectation. The Department had explicit employment policies for each type of employee. There was no 'general' employment contract. Additionally, the statements by Struck's supervisors cannot be reasonably relied

on when those supervisors had no statutory authority to bind the Department to an employment contract. See Lynch v. Lewiston School Comm., 639 A.2d 630, 633 (Me. 1994) (promises by school committee not binding where superintendent had ultimate hiring authority). Finally, the mere fact that the Department had a general practice of not terminating employees for arbitrary reasons does not give rise to a binding promise of "just cause" termination protection resulting in a property right. Id. at 633.

c.

Struck's complaint further alleges a violation of his right to privacy[9] under the Fourth Amendment in his intimate personal relationship with Jean Lettre. Because he has failed to allege any search or seizure, or even a threat of a search or seizure, perpetrated by Hackett, that claim for violation of his privacy right, a 'penumbral' right under the Fourth Amendment, must fail. "[T]here can be no Fourth Amendment violation when there has been no actual search." Everett v. Napper, 632 F. Supp. 1481, 1484 (N.D. Ga. 1986). Struck does not allege that Hackett

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[9]In his brief, Struck does not address any violation of his rights to privacy under the Fourth Amendment. This claim was included in the original complaint, however, and Hackett was denied a summary judgment.

asked inappropriate questions about his personal life, or demanded to inspect Struck's home or personal papers. The allegation is that he was terminated in retaliation for his relationship with Lettre, an allegation that implicates the right to privacy in personal relationships under the First, and not the Fourth, Amendment.

In response to Struck's First Amendment claim, the defendants contend, inter alia,[10] that there is no First Amendment right with respect to dating, and that, if there is such a right, it was not "clearly established" at the time of the incident in question. We agree.

The freedom of association protected under the First Amendment includes not only expressive association (i.e., for political or religious purposes) but also the "freedom of intimate association." Roberts v. United States Jaycees, 468 U.S. 609 (1984). Although Roberts may leave open the possibility that relationships short of marriage, such as engagements, will be constitutionally protected "intimate associations," the case law is far from certain on that issue. See Swank v. Smart, 989 F. 2d 1247, 1251-52 (7th Cir. 1990) (no right of intimate association

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[10]The defendants also contend that Struck was properly terminated for reasons unrelated to his relationship with Lettre.

implicated when police officer gave half-hour ride on motorcycle to young woman of casual acquaintance); see also City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989) (attendance at dance hall with other teenagers does not satisfy requirements); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 237 (1990) (relationship of ten hours carried out in a motel room not type of intimate association protected by the First Amendment).

A distinction between marital and nonmarital cohabitation is delineated in a number of areas of the common and statutory law. The constitutional right to privacy in the kind of relationship that Struck had with Lettre is certainly not "clearly established." See Cameron v. Seitz, 38 F. 3d 264, 273-275 (6th Cir. 1994) (right to marital association not clearly extended to engagement).

D.

In his cross-appeal, Struck argues that it was error to enter summary judgment in favor of Kennebec County and the Commissioners on Struck's section 1983 claim, because there are genuine issues of fact concerning whether the Commissioners had a policy of not reviewing Hackett's termination decisions, and whether that policy was a direct cause of Struck's loss of constitutional and statutory rights.

Struck's claim does not allege any direct action by the Commissioners that

would constitute a section 1983 violation. Although Struck asserts, under a theory of municipal liability, that the practices of the Commissioners allowed Hackett to violate his statutory and constitutional rights, Struck has demonstrated no violation of any of his clearly established rights. Accordingly, the section 1983 claim against the County and the Commissioners must fail.

II.

The court denied a summary judgment to the defendants on Struck's state law contract claims. Struck contends that the defendants' appeals from those denials are not immediately reviewable because they are interlocutory and are not final judgments. The final judgment rule is a prudential rule, judicially created and designed to prevent piecemeal appeals. Ryan, 622 A.2d at 76. One of the recognized exceptions to the final judgment rule is "applied when the interests of judicial economy dictate that the merits of the case should be addressed immediately. . .[;]" when review of a nonfinal order can finally dispose of the entire litigation, and immediate review is required by the interests of justice. Department of Human Servs. v. Lowatchie, 569 A.2d 197, 199 (Me. 1990) (citations omitted). Such is the case here. Those state law claims rest on the same factual allegations supporting Struck's section 1983 claims: that Struck had a right to continued employment by virtue of statute and by the conduct and

practices of the Sheriff's Department and some of its employees.

As the plaintiff, Struck has the burden to demonstrate the wrongfulness of his termination. It is clear that these defendants would be entitled to a judgment as a matter of law at a trial if Struck had presented nothing more than was before the court at the time summary judgment was entered. Accordingly, the defendants are entitled to a summary judgment. H.E.P. Dev. Group, Inc. v. Nelson, 606 A.2d 774, 775 (Me. 1992). Because the defendants' entitlement to a summary judgment is clear, it makes little sense to remand the case for any further proceedings. Lowatchie, 569 A.2d at 199; see Uhlstar Mfg. Corp. v. Waterville Urban Renewal Auth., 351 A.2d 538, 540-41 (Me. 1976).

Struck had no statutory right to continued employment, and no contract right by agreement with his employer. He has not established that any contract was created with authority to bind the County.

> [O]ne member of a board of selectmen cannot bind a town to a contract unless his authority to act alone is proved or his actions subsequently ratified. All persons contracting with town or city officers must take notice at their peril of the extent of the authority of such officers. It is not the

> town's burden to establish the absence of authority but the plaintiff's burden to prove the authority.

Sirois v. Town of Frenchville, 441 A.2d 291, 294 (Me. 1982) (citations omitted).

Similarly, the facts alleged by Struck are insufficient to support a claim for an implied contract of employment. A claim in the context advanced by Struck is not recognized in Maine. As we stated in Larrabee v. Penobscot Frozen Foods, 486 A.2d 97, 99-100 (Me. 1984):

> In Maine it has long been the rule that a contract of employment for an indefinite length of time is terminable at the will of either party. Under this rule, as well as under the law of the majority of jurisdictions, the Plaintiffs' allegations that the Defendant had entered into an implied contract to discharge them only in good faith and for good cause would be fatally deficient.... [P]arties may enter into an employment contract terminable only pursuant to its express terms-as 'for cause'-by clearly stating their intention to do so.

Struck's additional allegation that the Sheriff's Department breached its

implied duty of good faith and fair dealing when it failed to evaluate him during his probationary period and when it falsely assured him of his guaranteed, permanent position is without foundation. "[Plaintiff] urges us to recognize this cause of action [for breach of implied covenant of good faith and fair dealing] in the context of an employment contract where a violation of public policy is involved.... As noted above, we have consistently refused to recognize implied promises in employment contracts of indefinite duration." Bard v. Bath Iron Works Corp., 590 A.2d 152, 156 (Me. 1991) (citations omitted).

Struck's brief does not address the merits of his promissory estoppel claim, and the record is devoid of sufficient evidence to support such a claim. The elements of promissory estoppel are: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Wilson v. Strong, 474 A.2d 176, 178 (Me. 1984) (quoting Restatement (Second) of Contracts §90 (Tent. Draft Nos. 1-7, 1973)).

Struck cannot argue that he relied on the promises of the Sheriff's Department when he left his protected permanent position as a corrections officer for the unprotected probationary

position as a patrol officer because all promises and statements alleged by Struck were made after he had changed positions, and has alleged no actions taken by himself which would constitute detrimental reliance after he started his new position.

The entry is:

Order denying a summary judgment to defendaht Hackett on Count I vacated. Remanded for entry of a judgment for defendant Hackett.

Order denying a summary judgment to all defendants on Counts III - VI vacated. Remanded for entry of a judgment for defendants. Judgment affirmed in all other respects.

All concurring.

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